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IN THE

Supreme Court of the United States

October Term, 1962

No. 794

AMALGAMATED LITHOGRAPHERS OF AMERICA (Ind.) AND LOCAL No. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (Ind.),

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL SLATER,
Counsel for Petitioners,
120 East 41st Street,
New York 17, New York.

DELSON & GORDON,
Attorneys for Amalgamated Lithographers of America (Ind.) and Local No. 17, Amalgamated Lithographers of America (Ind.),
120 East 41st Street,
New York 17, New York.

GARRY, DREYFUS & MCTERNAN,
FRANCIS J. MCTERNAN,
Attorneys for Local No. 17, Amalgamated Lithographers of America (Ind.),
341 Market Street,
San Francisco 5, California.

ERNEST FLEISCHMAN,
DAVID IAN KRAMER,
of Counsel.

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Amalgamated Lithographers of America and Local No. 17, Amalgamated Lithographers of America (hereinafter referred to as "Petitioners") pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Ninth Circuit, entered on August 31, 1962, affirming the order of the National Labor Relations Board and granting enforcement to the order of the Board.

Opinions Below

The opinion of the court below (App. A, *infra*, pp. 23-45) is reported at 309 F. 2d 31. The opinion of the National Labor Relations Board is reported at 130 N. L. R. B. 985.

Jurisdiction

The order denying the petitions for rehearing in the court below was entered on November 9, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the exemption of the apparel and clothing industry from the application of §§ 8(b)(4)(B) and (e) of the National Labor Relations Act, as amended, accomplished by a proviso in § 8(e), is arbitrary and capricious and thereby renders § 8(e) void as discriminatory class legislation contrary to the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Assuming that § 8(e) is constitutional and taking cognizance of the fact that it proscribes contracts or agreements, express or implied, whereby employers cease or refrain or agree to cease or refrain from handling, using, selling or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, does it encompass within its meaning collective bargaining agreement clauses which would:

(a) enable Petitioners to reopen the agreement in the event an employer requested an employee to handle work subcontracted to a non-union shop (the "Trade Shop Clause");

(b) enable Petitioners to terminate the contract in the event an employer requested his employees to render produc-

tion assistance to a struck employer by performing work received from or destined for such struck employer (the "Termination Clause"); and

(c) prohibit the employer from disciplining any individual employee who refused to handle non-union or struck work (the "Refusal to Handle Clause")?

Statute Involved

The statutory provisions involved are §§ 8(b)(3), (4)(A) and (B), and (e) of the National Labor Relations Act, as amended, 73 Stat. 519, 29 U. S. C. §§ 158(b)(3), (4)(A) and (B), and (e) and are set forth in Appendix B, *infra*, pp. 46-47.

Statement of the Case and Disposition Below

A. The Board Proceeding.

This case arises out of a proceeding before the National Labor Relations Board. The Board's complaint charged the Petitioners with violations of §§ 8(b)(3), (4)(A) and (B), and (e) of the National Labor Relations Act, as amended, in that the Petitioners engaged in an overtime ban and a strike, one of the purposes of which was to secure contract clauses allegedly in violation of § 8(e) of the Act. The Board found that five clauses sought by Petitioners, the so-called Trade Shop, Struck Work, Chain Shop, Refusal to Handle and Termination Clauses, were in violation of § 8(e).

The Board did not consider Petitioners' challenge to the constitutionality of § 8(e), taking the position that it must assume the constitutionality of the Act it is required to administer (R. 67).[1]

The Board petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order (R. 67-70).

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[1] Page references are to the Transcript of Record below.

B. The Holding of the Court Below.

1. Constitutionality of § 8(e)

The court below rejected Petitioners' argument that these clauses were all legal because § 8(e) was unconstitutional in that the exemption granted the apparel and clothing industry by a proviso in § 8(e) is arbitrary and capricious, and discriminatory class legislation enacted in violation of the due process clause of the Fifth Amendment to the United States Constitution, stating:

> "For the reasons stated in *Employing Lithographers of Greater Miami, Florida* v. *N. L. R. B.*, 5 Cir., 301 F. 2d 20, 24-27, and *Brown* v. *Local No. 17, Amalgamated Lithographers of America*, D. C., 180 F. Supp. 294, 305-306, we hold that Section 8(b)(4) and (e) of the Act are not void under the Fifth Amendment." (App. A, *infra*, p. 44)

2. The Clauses Held Violative of § 8(e)

The court below granted enforcement to the order of the Board insofar as it held the Trade Shop, Termination and Refusal to Handle Clauses violative of § 8(e), and found the Struck Work and Chain Shop Clauses legal. (App. A, *infra*, p. 45).

(a) The Trade Shop Clause

The Trade Shop Clause reads as follows:

> "Section 22. Trade Shop Work: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorize to use the union label of the Amalgamated, then the Union in

its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such reopening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.

"(b) Union trade shops must affix the Union label on all their products before sending them to any other shop.

"(c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.

"(d) Upon request by the shop delegate an employer shall advise him of the source of any lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant."

The court below rejected Petitioners' contention that the Trade Shop Clause contains neither an express nor an implied agreement not to use the products of another employer and held that the clause contained an implied agreement not to handle non-union products in violation of § 8(e). (App. A, *infra*, pp. 27-29). This conclusion was reached despite the presence in the contract proposals (R. 610) of a clause specifically negating the existence of any implied agreements.

The court below rejected Petitioners' argument that the Trade Shop Clause would do nothing more than permit the parties to avoid having to negotiate in advance all of the terms and conditions which might be necessary if severe

alteration of conditions in the plant should occur as a result of a change voluntarily initiated by the employer in existing methods of production and subcontracting, and would instead permit such negotiations to take place when the change had occurred.

(b) The Termination Clause

The Termination Clause reads as follows:

> "Section 24. Termination: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above, or requests an employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer."

The Court below, which held the Struck Work and Chain Shop Clauses in Section 23 to be lawful, held that the Termination Clause must fall because it was broader than the clauses it was intended to implement. It rejected Petitioners' contention that the clause did not violate § 8(e) because this provision reserved Petitioners' right to terminate an agreement and not to deal with the contract employer under conditions therein contained and did not contain any agreement by the employer to cease doing business with any other person. (App. A, *infra*, p. 38).

(c) The Refusal to Handle Clause

The Refusal to Handle Clause reads as follows:

> "Section 25. The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any

lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24."

The court below held that the Refusal to Handle Clause was illegal because it enabled the Petitioners to enforce the Trade Shop and Termination Clauses which the court had held to be unlawful under § 8(e) (App. A, *infra*, pp. 38-39). The court rejected Petitioners' contention that the preservation of the personal right of an individual to refuse to handle work of a non-union or struck employer does not violate § 8(e).

Reasons for Granting the Writ

1. The court below decided important questions of federal law involving the constitutionality and interpretations of the more important and controversial provisions of the so-called Landrum-Griffin amendments to the National Labor Relations Act. These issues have never been passed on by this Court, and they should be settled.

Petitioners raised the issue of the constitutionality of § 8(e) in the proceeding both before the Board and the court. The basis of the Petitioners' challenge is that Congress through discriminatory class legislation enacted a proviso to § 8(e) exempting the "construction" and "apparel and clothing" industries without granting such exemption to any other industry similarly situated, despite its knowledge that other industries were so similarly situated. The court below relied wholly on the reasoning in the decision of the Court of Appeals for the Fifth Circuit in *Employing Lithographers of Greater Miami, Florida* v. *N. L. R. B.*, 301 F. 2d 20 (1962), which in turn cited with approval Judge Sweigert's opinion in *Brown* v. *Local No. 17, Amalgamated Lithographers of America*, D. C. N. D. Cal., 180 F. Supp. 294 (1960).

Judge Sweigert, in *Brown* v. *Local No. 17, Amalgamated Lithographers of America, supra,* assumed that there were substantial economic and social differences between the apparel and clothing industry on the one hand and the lithographic industry on the other, which justified Congress in granting the former the exemption, and denying the same treatment to the latter. He further presumed that differences between the industries "were considered by the Congress" (180 F. Supp. at 305). In *Employing Lithographers of Greater Miami, Florida* v. *N. L. R. B., supra,* the court alluded to the legislative history, and found therein the "necessary modicum of justification for the statutory qualification" (301 F. 2d at 26). Both Judge Sweigert and the Fifth Circuit erred because as a matter of fact, no hearings were held by Congress, not only as to the lithographic industry, but even with respect to the apparel and clothing industry itself. Judge Sweigert further, in passing on the application for temporary injunction in the § 10(l) proceeding, stated that the Petitioners would be permitted to submit proof in the then forthcoming Board hearings to prove the integrated nature of the lithographic industry (180 F. Supp. at 305). However, such offer of proof was rejected by the Board and the rejection was upheld by the court below (App. A, *infra,* pp. 28-29).

Petitioners respectfully submit that the assumptions made by the district court in the *Brown* case were unfounded, as evidenced by the record of the legislative history; and that the legislative history relied upon by the court in the *Miami* case, contrary to the conclusion drawn by the court therefrom that the classification enacted was based on "reasonable consideration" (301 F. 2d at 26), indicates that the classification was not made by the Congress on the basis of facts developed in legislative hearings because there were no hearings to justify the classification.[2]

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[2] See 301 F. 2d at 26 where in the reference to the Conference Report of the House Managers which stated that an exemption was being granted the apparel and clothing industry regardless of whether similar integrated processes of production existed in other industries, the court says "standing alone this would indicate arbitrariness."

Because the court below reached its decision that § 8(e) is not void under the Fifth Amendment on the basis of two court opinions which rest on faulty asumptions, we ask that the important question herein involved be settled by this Court.

We respectfully submit that the provisions of § 8(e) are arbitrary and capricious and constitute discriminatory class legislation so as to amount to a denial of due process of law. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Detroit Bank* v. *United States*, 317 U. S. 329 (1943); *Currin* v. *Wallace*, 306 U. S. 1 (1939); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937); *Norman* v. *Baltimore & Ohio Ry. Co.*, 294 U. S. 240 (1935). *Cf. Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266 (1938).

While Petitioners recognize that "there is no requirement of uniformity in connection with the commerce power", *Currin* v. *Wallace*, *supra*, as cited in 301 F. 2d at 25; and that "Congress may hit at a particular danger where it is seen", *Hirabayashi* v. *United States*, *supra*, and *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224 (1913) as cited in 301 F. 2d at 25; it is equally well established that the commerce power, broad as it may be, is not and was never intended to be absolute. The limitations of the Fifth Amendment apply to the federal government "when it is exercising the commerce power as well as other powers." *U. S.* v. *Twin City Power Company*, 350 U. S. 222 (1956).

It is submitted that although Congress has the power to enact legislation pursuant to the commerce power in a piecemeal fashion, it can do so constitutionally only by adhering to at least the fundamental requirements of "due process of law." *Cf. Hurtado* v. *State of California*, 110 U. S. 516 (1884); *Anderson National Bank* v. *Luckett*, 321 U. S. 223 (1944).

The facts of the instant case reveal a situation different from those in the cases relied upon by the court below to uphold the constitutionality of § 8(e), which point up even

more the arbitrary and irrational basis on which Congress acted in limiting the exemptions in this section. In *Hirabayashi* v. *United States, supra,* and the other cases cited above, those who were subjected to the statutes argued that they were discriminated *against* and it was held that on the facts there was enough evidence to find that the enactments were not arbitrary but the product of study and inquiry.

In the instant case Congress acted strangely, indeed, for without the benefit of notice or public hearings or ascertainment of facts, it enacted § 8(e) which contained a broad prohibition on hot cargo agreements and then discriminated by *favoring* arbitrarily two industries. It is one thing for Congress to have freedom to deal with "the evils it may observe" in piecemeal fashion, but quite another to declare as evil all practices of a certain type for all industries while carving out an exception for two without granting such exception to others similarly situated.

Representative Roosevelt commented about "discrimination in reverse" in these words:

> "Singled out for exception to the strict hot cargo provisions are union organizations in the garment and building industries. This is discrimination in reverse. While I am personally pleased to see them taken out from under what I consider highly questionable constitutional provisions, I cannot accept the premise that certain trade union groups—in either good or bad legislation—should be treated apart from the rest of the trade union movement. It is unfair to the trade union movement as a whole * * *." (Cong. Rec. House, September 4, 1959 (daily ed. 16644))

In seeking to ascertain the intent of Congress, it would be helpful to turn to the legislative history of the Landrum-Griffin amendments. However, there is very little such history concerning the apparel and clothing industry exemption and no history of legislative hearings on the problems

of other integrated industries. We respectfully refer the Court to a statement by Professor (now Solicitor General) Archibald Cox who was present at the time of enactment of the legislation as advisor to then Senator Kennedy:

> "The prohibition of 'hot cargo' contracts is the most vulnerable of the Landrum-Griffin Amendments. In the trucking industry it will serve a useful purpose. The apparel and clothing industries were excepted because there the prohibition would have raised havoc. Congress had no information about the prevalence or use of similar clauses in other industries—about their impact upon employers or their importance to union organization. The majority was content to make the loose assumption that a clause which was contrary to the public policy in the transportation industry must be equally undesirable in other segments of the economy." *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 273 (1959).

The principal reason as disclosed by the scant legislative history of the Landrum-Griffin amendments for Congress concerning itself with the area of secondary boycotts was Congressional apprehension over the conduct of the Teamsters Union. Prior testimony before the Senate had shown that the Teamsters Union had a particular affinity for the use of the secondary boycott, well in excess of other labor organizations.[3] Although the original Congressional trend apparently was to outlaw "hot cargo" contracts only in the transportation industry, later drafts of what became the Landrum-Griffin bill made such contracts illegal in all industries. At this point discussion developed, led by New York's two Senators, concerning the garment industry as an

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[3] See statement of James P. Mitchell, Secretary of Labor, before the Subcommittee on Labor and Public Welfare, Feb. 4, 1959, Cong. Rec. Senate, Feb. 4, 1959 (daily ed. pp. 1564, 1567). See also Sen. Rep. 187 on S. 1555.

integrated industry having a pattern of subcontracting going back over the years, which would be hurt by the proposed amendments.

Later, what amounts to a confession that Congress made an arbitrary exemption, wholly unrelated to any evidence, or lack of evidence, involving the exempted industry, is found in the Conference Report of the House Managers of the Bill. The House Conferees stated in this Report that the proposed bill contained a proviso which "* * * grants a limited exception in three specific situations in the apparel and clothing industry, but in no other industry regardless of whether similar integrated processes of production may exist between jobbers, manufacturers, contractors and subcontractors." (H. R. Rep. No. 1147, 86th Cong., 1st Sess. 40, 1 Leg. Hist. 934, 944).

Certainly this was an instance where the House Managers realized that persons and groups similarly situated were to be treated differently although there was no distinction based upon evidence adduced during Congressional hearings. Such treatment does not coincide with any principle of the fair and uniform application of the law. Congress recognized that the apparel and clothing industry was not alone in its problems nor in its integrated process of production.[4] It is clear that some Congressmen at least were aware that the exemption granted the apparel and clothing industry might be unconstitutional. Representative Libonati stated:

> "The garment industry was also excluded from certain restrictive provisions of the bill that is, secondary boycott or picketing by unions * * *. These two exclusions may subject these provisions to constitutional attack in the courts as class legislation." (Cong. Rec. House, Sept. 4, 1959 (daily ed. 16649)).

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[4] See, for example, the statement of Senator Morse (Cong. Rec., Senate, September 3, 1959 (daily ed. 16399) in opposition to the bill in which he noted that "Many industries, in addition to the garment trades are highly integrated, so that work proceeds from employer to employer in the process of manufacture."

Thus without providing any industry an opportunity to show that it too was integrated and for all practical purposes encountered similar difficulties in the area of contracting and subcontracting, Congress yielded to the special interest pleading of the sponsors of an exemption from the proscriptions of the statute and limited the favorable treatment to the garment and construction industries.

The exemptions granted did not result from a considered appraisal of the evils to be remedied but rather in the absence of any such appraisal or consideration. As described by Joseph A. Loftus, labor reporter for the *New York Times* Washington Bureau:

> "The 1959 law was enacted in a setting that did small credit to representative government. Passions were intense. More so even than in 1947, 'experts' on complex issues were bred almost overnight. Men shouted about evils and morals when their only concerns were narrow politics and short-run economics * * * * The legislation was written on the floor and later in joint conference under the white-hot glare of scores of frenzied lobbyists." (Cited in Symposium on LMRDA, *infra*, at 898)

If, as we submit, the exemption to the apparel and clothing industry is so arbitrary and discriminatory as to render the exemption proviso violative of the Fifth Amendment, the entire § 8(e) must fall. We respectfully submit that the legislative history of the Landrum-Griffin Amendments, previously discussed, fully supports the assumption that Congress would not have enacted the amendments without the proviso.[5] The entire § 8(e) and not merely the exemption

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[5] See Senator Kennedy's Comments on the House-Senate Conference in which he states:

"On the second point, we accept the broad language of the House Bill with respect to secondary boycotts. But we insist on a few wholly reasonable and necessary limitations. First, restrictions upon subcontracting which are absolutely essential to stabilizing wages in such industries as the garment industry are not forbidden." (Cong. Rec. Senate, Aug. 28, 1959 (daily ed. 15900)).

proviso is unconstitutional because the exemption for the apparel and clothing industry was a *sine qua non* for the passage of the amendments. As one writer stated:

> "* * * The refusal of Congress to make the exception uniformly applicable to all similarly integrated industries may well render the entire section unconstitutional. Cf. *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 Fed. 167. For, if a proviso is held to be unconstitutional, the remainder of the section to which it is attached will also be held unconstitutional if Congress would not have enacted the section without the proviso. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 316 (1936). The legislative history clearly indicates that the garment industry exception was a *sine qua non* of the amendments. (Citing 105 Cong. Rec. 16414 (Daily ed. Sept. 3, 1959))." (Previant, *The Labor Management Reporting and Disclosure Act of 1959: Interpretations and Implications—the Hot Cargo and Secondary-Boycott Sections: a Critical Analysis.* 48 Geo. L. J. 346, 351 (1959)).

We do not criticize the garment industry or the labor organizations in that industry in making Congress aware that the application of §§ 8(b)(4) and (e) of the Act to the apparel and clothing industry would eliminate their hard-fought battle to maintain their present high standards. Indeed, we cannot but regard the garment industry with admiration for raising the standards of an industry which was formerly associated with so-called "sweatshop" labor standards. Even the "sweatshop" argument loses a great deal of its thrust by reason of the minimum wage standards established by the Fair Labor Standards Act. So, too, the construction industry also has received an exemption from § 8(e) although construction employees are the highest hourly rated "blue collar" employees in the nation.

What is true concerning the conditions in an integrated industry such as the apparel and clothing industry is equally

true in other integrated industries, such as the lithographic industry. Congress, with an obvious lack of factual knowledge, discriminated against the entire labor movement by exempting two different industries, construction and garment, with different backgrounds, histories and problems, while knowingly discriminating against all others similarly situated.

That the court below was wrong in assuming that Congress considered, and that there was a rational basis for the distinction is evident from the foregoing, and is summarized by Senator Wayne Morse as follows:

> "The law (§ 8(e)) now in effect makes no distinction between the agreement which stabilizes an industry and one which promotes corruption, or greed. During the debate in the Senate, an amendment prohibiting 'hot cargo' agreements in the trucking industry was adopted. I recognized this as an effort to curb specific excesses revealed in the McClellan Committee hearings . . . But the House of Representatives adopted a complete ban on all such agreements and the law which was ultimately passed adopted the essence of the House approach * * *.
>
> "Here indeed is a new and far reaching notion in the law. Perhaps more than any other provision, it represents the legislative process in its most unkindly light: a revolutionary proposal adopted almost without benefit of hearings and with little or no knowledge of the economic forces which are involved." (Morse, *LMRDA: A Study of Legislative Excess*, in Symposium on the Labor-Management Reporting and Disclosure Act of 1959, 96, 118-119 (Slovenko ed. 1961).

2. Assuming that this Court should find that § 8(e) is constitutional, the writ should nevertheless be granted because the decision of the court below decided novel questions

with respect to the intent and application of § 8(e) which have never been passed upon by this Court.

(a) Both the Board and the court below held that the Trade Shop Clause was unlawful because it provided for a reopener in the event that the circumstances under which the contract was originally negotiated were changed. (R. 59; App. A, *infra*, p. 28). Both the Board and the court below refused to consider the offer of proof made by the Petitioners which sought to justify on economic grounds the reasons for the reopener in the event of such changed circumstances. The thrust of the Petitioners' argument before this Court is that § 8(e) does not contain any prohibition against the inclusion of a reopener in the event an employer elects to do business with non-union employers. The Petitioners urge only that if an employer freely chooses to change his method of operation and do business with non-union employers, the Petitioners, by reason of economic necessity, could justify a reopener of the contract to negotiate more equitable provisions in light of the changed circumstances.

Although the court below rejected certain offers of proof of this nature by the Petitioners on the ground that economic necessity could not justify violation of § 8(e), the Petitioners' offer of proof was not made to justify a violation of § 8(e), but rather to justify the necessity of renegotiating the terms of the contract if the employer voluntarily changed his method of operation. The court below rejected this argument with the statement, "But the prohibition of Section 8(e) is a broad one. Agreements of this kind, whether expressed or implied, are not made lawful by economic necessity." (App. A, *infra*, p. 29). Petitioners submit that § 8(e), broad as it is, contains no prohibition against the reopener of a collective bargaining agreement.

That Petitioners did not intend that the reopener should be used as an implied agreement on the part of the employers not to deal with any other persons, is indicated by the clause proposed by Petitioners as part of the new contract, which

specifically denied the existence of any agreement, oral or implied, not contained in the writing between the parties.[6] In holding that the presence of an otherwise valid reopening provision in the Trade Shop Clause, *per se*, makes the clause illegal, the court below has extended the scope of § 8(e) beyond the language contained therein.

(b) While the court below held the Struck Work and Chain Shop provisions to be legal, it nevertheless held the Termination Clause to be illegal because it provided that the Petitioners could terminate the contract in the event that the contract employer requested his employees to perform "any" work received from, or destined for, a struck employer.

Petitioners submit that there is nothing in § 8(e) which compels them to continue a contractual bargaining relationship under circumstances which are offensive to a trade union philosophy and to its right not to perform services under certain circumstances.

The Termination Clause does not give Petitioners the right to strike, which may be enjoinable under § 8(b)(4)(B) of the Act. It simply reserves to Petitioners a right not to deal with an employer who handles any work of a struck employer, without running afoul of the § 8(b)(4) provisions of the National Labor Relations Act, as amended.

(c) The Board found and concluded that the so-called Refusal to Handle Clause which provided that the employer would not discipline an employee for refusing to handle struck or non-union goods, was unlawful for the same reason

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[6] The disclaimer reads as follows (R. 610):

"Oral or Implied Agreement. This contract sets forth the entire understanding and agreement of the parties and may not be modified in any respect except by writing subscribed to by the parties. Nothing in this contract shall be construed as requiring either party hereto to do or refrain from doing anything not explicitly and expressly set forth in this contract; nor shall either party be deemed to have agreed or promised to do or refrain from doing anything unless this contract explicitly and expressly sets forth such agreement or promise."

that it determined the Termination Clause to be unlawful (R. 62). The court below stated that:

> "In our view it was not unreasonable for the Board to conclude that this clause constitutes a sanction available to the union to enforce the trade shop and termination clauses which we have held to be unlawful under Section 8(e)." (App. A, *infra*, p. 39).

We submit, however, that the Refusal to Handle Clause is lawful because it preserves to the individual employees the option to handle or refuse to handle certain work. The Act did not deny the right of an employee to determine for himself whether he would handle struck or non-union goods. See *Teamsters, Local 554* v. *N. L. R. B.*, 262 F. 2d 456, 463 (D. C. Cir. 1952), where the court said:

> "The individual employee has a right to make his own independent choice as to whether he will transport Clark and Coffee freight, free from any direct or indirect pressure or 'encouragement' by the union."

Congress intended, as shown by the legislative history of the Landrum-Griffin amendments, that the individual employee should have the right to follow the dictates of his conscience free from the threats or inducements of either the employer or the union with respect to so-called hot cargo situations. (See *e.g.*, Cong. Rec. House, Aug. 12, 1959 (daily ed. 14343-14344)). As Judge Sweigert said in the related injunction proceeding:

> "Of course, an individual employee has a right to refuse to perform services for an employer, a right with which the Congress obviously did not intend to interfere and with respect to which an employer may not coerce the employee." (*Brown* v. *Local No. 17 Amalgamated Lithographers of America*, *supra*, at 304).

Neither § 8(b)(4) nor § 8(e) forbids an employer from voluntarily declining to handle goods labeled unfair by a union. The violation is not established unless there is shown to be inducement covered by § 8(b)(4)(i), coercion covered by § 8(b)(4)(ii), or the entering into an agreement not to handle certain goods, now proscribed by § 8(e). In guaranteeing to the individual employee the right to refrain from handling struck or non-union goods, an employer does not thereby impliedly or otherwise agree that he will not handle non-union products or deal with non-union employers. The only agreement involved is that the employer will not discharge or otherwise discipline his employees. One commentator has urged the legality of such a clause as follows:

> "There are several reasons supported by case law which tend to establish the validity of such a clause: First, the boycott prohibitions and the hot-goods limitations apply only to unions and their agents. Actions of employees individually or in concert are not encompassed by the restrictive amendments. Second, the Board has repeatedly asserted that it will not police collective bargaining agreements. The Supreme Court recently stated: 'Our labor policy is not presently erected on a foundation of government control of the results of negotiations.' (NLRB v. Insurance Agents Int'l. Union, AFL-CIO, 361 U. S. 872 (1960).) Third, to find such anti-disciplinary clause unlawful the Board would indirectly endorse the imposition of discipline upon individual employees." (Greenberg, *The Nature and Impact of the Secondary Boycott and Hot Goods Limitations of LMRDA*, in Symposium on the Labor-Management Reporting and Disclosure Act of 1959, 858, 866-867 (Slovenko ed. 1961).)

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL SLATER,
Counsel for Petitioners,
120 East 41st Street,
New York, New York.

DELSON & GORDON,
Attorneys for Amalgamated Lithographers of America (Ind.) and *Local 17, Amalgamated Lithographers of America (Ind.),*
120 East 41st Street,
New York 17, New York.

GARRY, DREYFUS & MCTERNAN,
FRANCIS J. MCTERNAN,
Attorneys for Local No. 17, Amalgamated Lithographers of America (Ind.),
341 Market Street,
San Francisco 5, California.

ERNEST FLEISCHMAN,
DAVID IAN KRAMER,
of Counsel.

Proof of Service

I, Carl Slater, counsel for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of February, 1963, I served copies of the foregoing petition for writ of certiorari on the Respondents, National Labor Relations Board, Lithographers and Printers National Association, and Employing Lithographers Association, a Division of the Graphic Arts Employers Association, by mailing copies in duly addressed envelopes, with first class postage prepaid to Respondents' attorneys of record as follows: to Hon. Archibald Cox, Solicitor General, United States of America, Washington 25, D. C.; to Stuart Rothman, General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington 25, D. C.; to Helen F. Humphrey, Esq., 1509-22nd Street, Washington, D. C.; and, by air mail, to Angell, Adams, Gochnauer, Elder & Holmes, 200 Bush Street, San Francisco 4, Calif.

/s/ CARL SLATER,
Carl Slater
Counsel for Amalgamated Lithographers of America (Ind.) and *Local 17, Amalgamated Lithographers of America (Ind.)*,
120 East 41st Street,
New York 17, New York.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,410

Aug. 31, 1962

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) and LOCAL NO. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.),

Respondents,

LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION,

Intervenors.

On Petition for Enforcement of an Order of the National Labor Relations Board

Before:

HAMLEY, HAMLIN and BROWNING, *Circuit Judges.*

HAMLEY, *Circuit Judge*:

The National Labor Relations Board has petitioned this court for enforcement of its order entered against respondent unions, and reported in 130 NLRB (102) 985.[1] Two

[1] The respondents are Amalgamated Lithographers of America (Ind.), herein called "International," and Local No. 17 of the Amalgamated Lithographers of America (Ind.), herein called "Local 17."

employer-groups were intervenors in the Board proceeding and have been permitted to intervene here.[2]

The primary question presented is whether certain clauses which the unions sought to have included in collective bargaining agreements are "hot cargo" clauses proscribed by section 8(e) of the National Labor Relations Act, as amended (Act), 29 U. S. C. § 158(e).[3] Finding that they were unlawful, the Board concluded that the unions violated section 8(b)(4)(A) and (B) of the Act, 29 U. S. C. § 158(b)(4)(A) and (B), by striking and invoking an overtime ban to obtain such clauses.

The Board further found that the unions, by resorting to these pressures and insisting upon the inclusion of the clauses, refused to bargain in good faith in violation of

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[2] The intervenors are Lithographers and Printers National Association, Inc., and Employing Lithographers, a division of the Graphic Arts Employers Association, herein called "Association."

[3] Section 8(e) reads as follows:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

section 8(b)(3), 29 U. S. C. § 158(b)(3). Finally, the Board found that the unions violated section 8(e), by entering into agreements with certain employers reinstating an expired collective bargaining contract containing clauses of this kind.

Consistent with these findings the Board ordered the unions to cease and desist from such practices and to post notices and take other affirmative action of a kind which is customary in such cases.

Local 17 is the bargaining representative of lithographic employees who work for the fifteen employer-members of the Association. It also represents the lithographic employees of more than a hundred other employers in Northern California, herein called "Independents", who are not members of the Association. Among these Independents are Schwabacher-Frey Co., Neal Stratford & Kerr, Merrill Reed Lithographers, and Hogan-Kaus Lithograph Co., herein called Schwabacher, Neal, Merrill and Hogan. There are also additional lithographic employers in Northern California who are not members of the Association but with whom members transact business. The employees of this group of employers are unorganized or are represented by other unions not involved in this proceeding.

Under customary procedure, Local 17, with the approval of the International, first negotiates a "master agreement" with the Association. It then executes separate contracts with each Independent adopting the provisions of the master agreement. The most recent master agreement was one which became effective on October 22, 1957, subject to termination on October 18, 1959, upon sixty days' notice.

This contract contained clauses relating to struck work and trade shops which were lawful at the time the contract was executed. On September 14, 1959, however, the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) was enacted amending, effective November 13, 1959, section 8 of the Act. Section 8(e), thereby added to the Act, had the effect, as respondents concede, of

invalidating the indicated clauses of the 1957 agreement as of November 13, 1959.

About August 17, 1959, Local 17 advised the Association and each Independent of its desire to terminate the existing agreement on October 18, 1959. At the same time Local 17 requested that representatives of the Association meet with it in order to negotiate a new contract. Negotiations between the parties were initiated on September 9, 1959, and about sixteen meetings between Local 17 and the Association were thereafter had.

Commencing about October 12, 1959, Local 17 with the authorization and approval of the International, demanded that the Association agree to inclusion in the new contract of the five clauses which the Examiner and Board later found to be illegal "hot cargo" clauses. The Association refused to agree to these contract demands. Thereafter the parties were concerned in their negotiations with two principal items, a raise in wages for the employees, and these contract clauses demanded by the unions.

On October 18, 1959, Local 17 instituted a ban on overtime work. Negotiations finally reached an impasse on November 20, 1959, and three days later the unions instituted a strike. On or about November 21, 1959, Schwabacher, Neal, Hogan and Merrill, and some other Independents entered into agreements with Local 17 whereby they were permitted to continue operations pending the negotiation of a new contract with the Association.

The NLRB proceedings were instituted on October 26, 1959. On December 7, 1959, the Board's regional director, pursuant to section 10(l) of the Act, 29 U. S. C. § 160(l), instituted injunction proceedings in the District Court for the Northern District of California, Southern Division. On January 13, 1960, the district court filed a decision finding the strike unlawful, ordering a temporary injunction, and requesting the regional director to submit a form of findings, conclusions, decree and writ.[4] The general counsel of the

[4] *Brown v. Local 17, Amalgamated Lithographers,* 180 F. Supp. 294.

Board submitted such forms but the unions objected to them and no final decree was ever entered. On January 30, 1960, respondents and the Association agreed upon terms of a new collective bargaining contract and the strike was terminated.

We first consider the union's contention that the Board erred in finding and concluding that the five questioned clauses which the union sought to have included in the new agreement were proscribed by section 8(e) of the Act.

The first of these is the "trade shop" clause, set out as section 22 of the contract tendered by the unions.[5] The Board found and concluded that this clause constitutes an implied agreement that the employer will not handle any non-union work.

Respondents do not deny that if the trade shop clause constitutes an implied agreement of that kind, it is proscribed by section 8(e) quoted in note 3 above. They argue,

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[5] "Section 22. Trade Shop Work: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such reopening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.

"(b) Union trade shops must affix the Union label on all their products before sending them to any other shop.

"(c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.

"(d) Upon request by the shop delegate an employer shall advise him of the source of any lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant."

however, that the clause leaves it completely to the discretion of the employer whether he wants to handle the work of a non-union shop, there being no provision of the clause which expressly or by implication requires him to refrain from doing business with such a shop.

Respondents recognize that, in the event the employer does do business with a non-union shop, the clause in question entitles the unions to reopen the entire contract for negotiations, and to terminate the contract if agreement is not reached within ten days. But respondents contend that these provisions have only an incidental effect upon the course an employer may choose in regard to handling non-union work or dealing with non-union employees, and do not amount to an implied agreement of the kind found by the Board.

Moreover, respondents argue, the trial examiner rejected their offers of proof which would have established that the purpose of the clause was not to forbid employers from dealing with non-union shops, but to enable the unions to reassess their economic demands in the event the employer followed such a practice. Thus, respondents argue, a change of this kind in the employer's method of operation would require new contractual arrangements covering such matters as increased wages or decreased hours of work in the light of the employer's increased profits, modification of apprentice ratios, establishment of an out-of-work fund, and revisions in the jointly-administered pension plan.

Under the trade shop clause in question, the entire contract is predicated on the assumption that the employer will not handle any non-union goods. The employer agrees that he will deal with non-union employers only at the risk of giving up all of his benefits under his contract. In our opinion this provision and the "refusal to handle" clause discussed below, considered together, amount to an implied agreement not to deal with such employers.

The proffered evidence which was rejected by the trial examiner tended to show that it was economically advan-

tageous for the union to have employers refrain from dealing with non-union employers. But the prohibition of section 8(e) is a broad one. Agreements of this kind, whether express or implied, are not made lawful by economic necessity.

We conclude that the Board did not err in finding and concluding that the trade shop clause is proscribed by section 8(e) of the Act. In this regard we are in agreement with the view expressed in *Employing Lithographers of Greater Miami, Florida v. NLRB*, 5 Cir., 301 F. 2d 20; and *Brown v. Local 17, Amalgamated Lithographers*, D. C. N. D. Cal., 180 F. Supp. 294, 302-303.

The second questioned clause is the "struck work" clause, which appears as section 23(a) of the contract tendered by the unions.[6] The Board found and concluded that this clause constitutes an implied agreement that the employer will not handle any work for any struck plant.

Respondents do not contend that an employer and a union may lawfully agree that the employer will not render any assistance to another employer whose plant is struck by the union. This is forbidden by section 8(e) of the Act. But they argue that the particular clause here in question merely embodies the so-called "ally" doctrine established by *Douds v. Metropolitan Federation of Architects*, S. D. N. Y. 75 F. Supp. 672, and *NLRB v. Business Machine and Office Appliance Mechanics, etc.*, 2 Cir., 228 F. 2d 553.

In these decisions it was held that an independent employer loses his neutral position and becomes an ally of a struck employer if he performs so-called "farmed out" work. "Farmed out" work is that which the struck employer would

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[6] "Section 23. Struck Work: (a) The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck by any Local of the Amalgamated Lithographers of America or the International or where members of any such Local or the International are locked out, and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work (other than work actually in process in the plant) customarily produced by such employer."

ordinarily perform but is unable to perform because of the labor dispute. In such situation the picketing of the ally is permissible because such employer "knowingly does work which would otherwise be done by the striking employees of the primary employer." *NLRB v. Business Machine and Office Appliance Mechanics*, above, at page 559.

The Board agrees that the "ally" doctrine remains in effect notwithstanding the enactment of section 8(e) in 1959. But it argues that the literal language of the proposed struck work clause goes beyond the permissible limits of the ally doctrine and, therefore, that the Board's finding as to the illegality of the clause is reasonable and proper. The same view was expressed concerning this identical clause in *Brown v. Local 17*, 180 F. Supp. 294, at 300-301.

The clause in question has two parts. The first of these is a general statement that the employers will not render assistance to any lithographic employer, any of whose plants are struck by any Local or the International or where members of any such Local or the International are locked out. The second part is an implementation clause which provides that in carrying out the purpose expressed in the general statement the employees shall not be requested to handle any lithographic work (other than work actually in process in the plant) "customarily produced by such employer."

Respondents do not deny that if the general statement stood alone it would be unlawful because it embodies more than the ally doctrine. But they contend that the general statement must be read together with, and in the context of, the implementation clause, and that so reading the entire clause it embraces nothing more than the ally doctrine.

We do not understand that the Board objects to reading the general statement in the light of the implementation clause. In fact that is exactly the technique the Board followed in the Miami case, *Amalgamated Lithographers of America and Local 78*, 130 NLRB (107) 968, 974. It was there held that although the general statement in the struck work clause was as broad as in the case before us, the entire clause, read in the light of the implementation language

there used, embodied no more than the "ally" doctrine.[7] But the Board believes that the implementation language in the struck work clause before us does not limit the clause as a whole to an application of the ally doctrine.

In reaching this conclusion the Board construes the words "such employer," at the end of the implementation language, as referring to the "Employers," referred to at the beginning of the struck work clause. The latter are contracting parties to the collective bargaining agreement. So reading the words "such employers" the Board was led to conclude that the struck work clause ". . . would have precluded Association members from doing not only 'farmed-out' work which the struck employer normally performs, but also work *customarily* performed for him by another employer."

In our opinion this represents a patent misconstruction of the clause. At the outset, the struck work clause identifies employer parties to the contract as the "Employers" (capitalized and in the plural). The clause refers to a struck employer (not a contracting party) as "any lithographic employer" (not capitalized and in the singular). With these antecedents it is evident to us that the closing words of the clause, "customarily produced by such employer," apply to a struck employer and not to "Employers" who are contracting parties.

If the words "such employer" at the end of the clause are construed to mean a contracting Employer, then the effect would be to relieve employees from doing lithographic work which a contracting Employer "customarily" does for a struck plant, but not to relieve such employees from doing lithographic work which a contracting Employer does for a struck plant only because such work is "farmed out" as a result of the strike. This would be exactly opposite from

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[7] In reviewing that provision of the Board order, the Fifth Circuit disapproved of this technique in construing the struck work clause there in issue. That court held, in effect, that the general statement standing alone was unlawful and that such "illegality" could not be removed by the implementation language as this would be rewriting the contract for the parties. 301 F. 2d 20, at page 28.

the purpose of such a clause, namely, to prevent a contracting Employer from becoming an ally of a struck plant.

It would have been better if the words "such employer" had been expressly defined by adding thereto, as in the struck work clause involved in the *Miami* case, the words "involved in such strike or lock-out." Nevertheless, and for the reasons stated above, we believe that the words, as used in the clause before us, could only refer to a struck employer.

As so read, the clause embodies only the ally doctrine. Employees are to refrain from handling lithographic work "customarily produced by such [struck] employer." This is the work which would be farmed out. They are left free to perform work which the contracting employer normally does for the struck employer.

Unlike the Fifth Circuit in the *Miami* case, we do not believe that the technique of reading the broad general statement of the struck work clause in the light of the implementation language, is "rewriting" the contract for the parties. All of the language of the clause is theirs. Our only problem is to determine the meaning of the words they have used. Since the clause as construed above manifests the intention that it be implemented only to the extent permissible under the ally doctrine, it is reasonable to conclude that this is the only purpose of the clause.

We hold that the Board erred in finding and concluding that the struck work clause proposed by respondents is proscribed by section 8(e) of the Act.

The third questioned clause is the "chain shop" clause which appears as section 23(b) of the contract tendered by the unions.[8] The Board held that this clause "standing by itself," is unlawful, because it permits a kind of strike which

[8] "Section 23. . . (b) [Chain Shop] The Employers agree that the employees covered by this contract shall not be requested to handle any work in any plant if in another plant of any employer or any subsidiary of such employer in any part of the United States or Canada or any Local of the Amalgamated Lithographers of America or the International is on strike or members of such Local or International are locked out."

is unlawful under section 8(b)(4) of the Act.[9] The complete statement of the Board's reasoning in reaching this conclusion is quoted in the margin.[10]

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[9] Section 8(b)(4), 29 U. S. C. 158(b)(4) contains subparagraphs (A) through (D), followed by two provisos. The Board decision, briefs herein, and the cited cases indicate that only section 8(b)(4)(A) and (B) are relevant to the question before us. This part of the section reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

[10] "We also find, contrary to the Respondents' contention, that the 'chain shop' clause standing by itself is unlawful. It not only permits a sympathy strike in one plant of an employer where another plant of the same employer is struck, but also permits a strike in the plant of the principal company where the plant of a subsidiary is struck or vice versa, even though the principal and subsidiary do not constitute a single employer within the meaning of the Act. The latter type of strike is unlawful under Section 8(b)(4).[12] [[12] Roy vs. N. L. R. B., 251 F. 2d 771 (C. A. 1); Bachman vs. N. L. R. B., 266 F. 2d 599 (C. A. 8).] However the strike be labeled, 'sympathy' or otherwise, the effect of the 'chain shop' clause is exactly like that of the 'struck work' clause, at least insofar as company and subsidiary are separate employers within the meaning of the Act."

The chain shop clause, "standing by itself" does not have anything to do with strikes or other coercive action. It provides only that the primary employer shall not request his employees to do certain work. However, reading that clause in conjunction with another of the questioned clauses (section 24, "Termination")[11] it is fair to say that the primary employer agrees to a strike as an ultimate sanction if, in the breach of the chain shop clause, he requests his employees to do work proscribed under that clause.

But the fact that a strike or other coercive activity of the kind described in section 8(b)(4) is for an objective there made unlawful does not of itself render unlawful a contract whereby the employer agrees to voluntarily act in such manner as would accomplish such an objective. This was settled in *Local 1976, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 357 U. S. 93.[12]

[11] "Section 24. Termination: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above, or requests an employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer."

[12] It was there held that despite the section 8(b)(4)(A) proscription against strikes or other coercive conduct to enforce a secondary boycott, an employer may voluntarily sanction and support a boycott and hence his agreement to do so is not unlawful. The Supreme Court said in that case (at page 108): ". . . the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. . . ." It was this decision which motivated Congress to enact the 1959 amendments which added section 8(e), outlawing agreements to engage in secondary boycotts, and added language to section 8(b)(4)(A) making it an unfair labor practice for a union to strike or engage in other coercive activity for the purpose of forcing an employer to enter into an agreement of the kind described in section 8(e). See 2 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (Govt. Print. Office, 1959), 1707-1709.

It follows that if the chain shop clause is unlawful it must be because some provision of the Act other than section 8(b)(4)(A) and (B) make it so. Neither the Board nor the trial examiner cited any other section in support of this view, nor has counsel for the Board in this review proceeding. In its brief in this court, however, counsel for the Board has characterized the chain shop clause in such manner as to indicate that the Board believes the clause to be violative of section 8(e). The language to which we have reference is quoted in the margin.[13]

That section 8(e) is the authority relied upon in holding such a clause unlawful is more clearly indicated by the position taken by the Board's counsel in the Board proceedings in the *Miami* case. As stated by the Board in its decision in that case (130 N. L. R. B. [No. 107] 968, 973), the general counsel there contended that the chain shop and other clauses ". . . are illegal in that they would require em-

[13] "Respondents' proposed clause, however, precludes handling the work of a subsidiary, and sanctions a sympathy strike at such subsidiary, even in the absence of common control between parent and subsidiary. Cf. *Roy v. N. L. R. B.*, 251 F. 2d 771 (C. A. 1); *Bachman v. N. L. R. B.*, 266 F. 2d 599, 558-559 [sic] (C. A. 8).[18] [18] Compare *Amalgamated Lithographers and Local 78, supra*, 1308 NLRB No. 107, 47 LRRM 1380, where the Board found that the Union's 'chain shop' clause was valid because the clause on its face disclosed that it was limited to subsidiaries with respect to which there was common control, as well as common ownership. Whether or not there is actual control in any given case depends, of course, on the particular facts, including the identity of management functions, the extent of interrelation and integration of operations, the measure of control over labor relations policy, etc. See *Int. Bro. of Teamsters (Alexander Warehouse and Sales Co.)*, 128 NLRB 916. While the proposed clause need not specify in detail the individual factors which go into the question of control, the language must be sufficient to manifest an intention to limit its applicability to 'one economic enterprise' (*National Union of Marine Cooks and Stewards (Irwin-Lyons Co.)*, 87 NLRB 54, 56, 83.)] Hence, as the Board pointed out (R. 62), whether 'the strike be labeled "sympathy" or otherwise the effect of the "chain shop" clause is exactly like that of the "struck work" clause, at least insofar as company and subsidiary are separate employers within the meaning of the Act."

ployers to cease or refrain from, or agree to cease or refrain from, handling, using, selling, transporting, or otherwise dealing in the products of other employers or to cease doing business with other persons within the meaning of Section 8(e) of the Act. . . ." [14]

Section 8(g) of the Act, quoted in note 3, makes it an unfair labor practice for a union and a primary employer to enter into an agreement whereby such employer ceases or refrains, or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any *other* employer, or to cease doing business with any *other* person.

On the other hand, the chain shop clause here in question is not an undertaking by a primary employer not to handle the work of *another* employer. It constitutes only an agreement by a primary employer not to request his employees to handle *his own* work in any of *his* plants, if, in another of his plants, or in a plant of his subsidiary, any local of the International, or the International, is on strike or members thereof are locked out. Assuming that a "subsidiary" within the meaning of the chain shop clause could be an "other" person or employer within the meaning of section 8(e), there is nevertheless lacking in this clause any agreement not to handle the work of that "other" person or employer.

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[14] In that case the Board apparently accepted this as the issue. It determined, however, that the language of the chain shop clause there involved, which, instead of using the term "subsidiary," used the phrase, "wholly owned and controlled by the company or commonly owned and controlled," sufficiently limited the operation of that clause to a single employer within the meaning of the Act. On review the Fifth Circuit, in the *Miami* case, held that the chain shop clause was not sufficiently explicit in this regard, and was therefore unlawful, no statutory or other authority being cited for the proposition here under discussion. 301 F. 2d 20, at pages 28-29. In *Brown v. Local No. 17, Amalgamated Lithographers of America*, N. D. Cal., S. D. 180 F. Supp. 294, 301, involving the chain shop clause now before us, it was stated that the regional director of the Board had reasonable cause to believe that the clause is "at least in part, in violation of Section 8(e)."

It is true that if the primary employer is ever called upon to honor the chain shop agreement, his *own* work which he must then not request his own employees to perform might include some work which he customarily does for the "other" person or employer, if the "subsidiary" is deemed to be such. But the thrust of the clause is not to bind the employer to cease handling the work of other persons or employers, and if this actually occurred in a particular case, the employer has an effective remedy under section 10(a), 29 U. S. C. § 160(a).

The legality of a contract clause was involved in only one of the four cases cited by the Board in support of its view that a "subsidiary" may be an "other" employer within the meaning of the Act. This was the situation in the *Miami* case, referred to above (*Employing Lithographers of Greater Miami, Florida v. NLRB*, 5 Cir., 301 F. 2d 20), wherein the proposition that a chain shop clause of this kind would be unlawful under section 8(e) was assumed but not discussed. In the other three cases,[15] the question arose not in considering the legality of a contract clause, but in determining whether coercive union action in a particular concrete situation was an unfair labor practice. Section 8(e) was not involved in any of those three cases.

It is therefore our opinion that since it is not the purpose of this chain shop clause to contractually bind a primary employer not to handle the work of another person or employer, the clause is not unlawful under section 8(e), even assuming that a "subsidiary" of the primary employer may be an "other" employer. Since there is no other provision of the Act making such an agreement unlawful we conclude that the Board erred in finding and concluding that the chain shop clause is unlawful.

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[15] *Truck Drivers and Helpers Local Union No. 728, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Empire State Express, Inc.*, 5 Cir., 293 F. 2d 414; *Bachman Machine Co. v. NLRB*, 8 Cir., 266 F. 2d 599; *J. G. Roy & Sons Co. v. NLRB*, 1 Cir., 251 F. 2d 771.

The fourth questioned clause is the "termination" clause, quoted in note 11.[16] The Board found and concluded that, considered in context with the other questioned clauses, the termination clause:

> ". . . is the sanction intended to insure that the contracting employer will not handle certain 'hot goods.' As a component part of the implied agreement to achieve an illegal objective, it partakes of that illegality."

This clause implements section 23 of the proposed agreement, which contains the struck work clause (a) and the chain shop clause (b). Respondents argue that if section 23 is legal there is no problem with respect to the termination clause insofar as it relates to section 23.

We have held that neither the struck work clause nor the chain shop clause is unlawful. In validating the struck work clause, however, we have construed it as applying only with regard to struck work which is not customarily handled by the primary employer. But this termination clause is not so limited. It applies with regard to "any" work received from or destined for any employer involved in a strike or lockout of the kind referred to in section 23 of the proposed agreement, whether such work was "customary" or "farmed out" work.

Since it is unlawful under section 8(e) for an employer to agree that he will refuse to handle work of another employer which he customarily handles, this termination clause is unlawful. The Board did not err in so finding and concluding.

The final questioned clause is the so-called "refusal to handle" clause, contained in section 25 of the proposed agree-

[16] This termination clause is to be distinguished from the termination provision of the trade shop clause discussed earlier in this opinion.

ment.[17] The Board found and concluded that this clause is unlawful for the same reason that it determined the termination clause to be unlawful.

Respondents argue that the refusal to handle clause merely preserves to the individual the option to handle or refuse to handle certain work. They argue that the Act is not intended to impinge upon the right of an employee to determine for himself whether he would handle hot cargo.

In our view it was not unreasonable for the Board to conclude that this clause constitutes a sanction available to the union to enforce the trade shop and termination clauses which we have held to be unlawful under section 8(e). We therefore hold that the Board did not err in making this determination.

Respondents further argue that even if any or all of the clauses discussed above are unlawful, the Board erred in finding and concluding that respondents' strike and ban on overtime work, in connection with their efforts to obtain a collective bargaining agreement to their liking, were unfair labor practices.

The Board held that the strike and overtime ban were for the purpose of securing agreement on these clauses. It concluded therefrom that since, in its view, those clauses are unlawful, the strike was an unfair labor practice under section 8(b)(3) and (b)4(A) and (B), and the overtime ban was an unfair labor practice under section 8(b)(3).

Section 8(b)(3) provides that it is an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer. "A labor organization which insists upon the inclusion of illegal contract provi-

[17] "Section 25. Refusal to Handle: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24."

sions refuses to bargain collectively within the meaning of section 8(b)(3). *International Typographical Union Local 38 v. N. L. R. B.*, 1 Cir., 278 F. 2d 6, 12, *rev'd in part and aff'd in part by an equally divided Court*, 365 U. S. 705 (reversal and Court division on the question of the legality of the contract provisions involved). Section 8(d) requires the parties to collective bargaining to meet and confer in good faith. Either party's insistenc upon contract provisions known by him to be unlawful as evidence of a desire not to reach an agreement.

Even though the offending party's view of the law is honestly mistaken, however, his good faith is not available as a defense to a charge of refusal to bargain. *Old King Cole, Inc. v. N. L. R. B.*, 6 Cir., 260 F. 2d 530.[18]

Therefore a strike or an overtime ban to obtain an agreement which is unlawful under section 8(e) is an unfair labor practice under section 8(b)(3) pertaining to refusals to bargain collectively.

A strike or other coercive action to obtain a contract clause which is unlawful under section 8(e) is also an unfair labor practice under the express language of section 8(b)(4)(A).[19]

Respondents do not dispute the view just expressed that a strike or overtime ban to secure agreement on unlawful clauses is an unfair labor practice. But they assert that the

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[18] In *NLRB v. Insurance Agents', International Union, AFL-CIO*, 361 U. S. 477, it was held that concerted on-the-job activities by union members of a harassing nature designed to interfere with the conduct of the employer's business, for the avowed purpose of putting economic pressure on the employer to accede to the Union's bargaining demands, is not a failure to bargain in good faith as required by section 8(b)(3) and (d). But in that case no unlawful contract clauses were involved. Here the harassing tactics of an overtime ban were employed to obtain agreement to unlawful clauses. We do not read the *Insurance Agents'* case as a holding that harassing tactics may be employed to gain the inclusion of unlawful contract provisions.

[19] We need not decide whether such a strike is also an unfair labor practice under section 8(b)(4)(B).

evidence does not support the Board finding that this was the purpose of the strike and ban.

Respondents call attention to evidence indicating that, in addition to the negotiations concerning these clauses, there were continuous and serious negotiations concerning wages and other economic features of the contract, and that the parties never reached agreement as to these other matters. Additional items of evidence relied upon as showing that the strike and ban were not for the purpose of obtaining agreement on the clauses, are referred to in the margin.[20]

On the other hand, there was evidence that at the very outset of the negotiations of the 1959 contract, respondents made it clear that the questioned clauses would have to be incorporated in the new contract. The employers were told that the unions regarded these clauses as "the lifeblood of the organization," and that they had been drawn by counsel for the International and had to be accepted without change.[21] On October 18, 1959, the employers were warned by letter that they had three days in which to accept an enclosed new contract containing the clauses or else a ban on overtime work would be instituted. On November 20, 1959, the president of Local 17 made the statement that the proposals "had to be in the contract or there would be no contract." The strike commenced three days later.

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record con-

[20] After the strike was called, the employers published an advertisement which was critical of the unions only with regard to their economic demands. During the negotiations the employers made a proposal that the previous contract with struck work and trade shop clauses concededly made illegal by the 1959 amendments, be extended. It was customary for local 17 to ban overtime work upon the termination of its contract and the instant ban was, in that respect, a continuation of this practice not related to any particular proposals.

[21] On November 20, 1959, the employers offered to secure the aid of the Federal Mediation Service to break the deadlock in negotiations over the disputed clauses. The president of Local 17 rejected the proposal stating that "this language could not be changed by anyone any way so why bring them in."

sidered as a whole are conclusive. Section 10(e) of the Act, 29 U. S. C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 491. Our review of the record convinces us that, applying this test, the Board did not err in finding that one of the objects of the strike and overtime ban was to secure incorporation of the clauses in dispute in any new collective bargaining agreement.[22]

In order to hold that a strike or other coercive action is an unfair labor practice under section 8(b)(4), it is not necessary to find that the sole object thereof was one which is prohibited by that statutory provision. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 689. It is sufficient if one of its objects is unlawful. *Dept. & Specialty Store Employees' Union v. Brown*, 9 Cir., 284 F. 2d 619, 628. We think the same rule should apply in determining whether a labor organization has refused to bargain collectively within the meaning of section 8(b)(3) and (d).

We therefore hold that the Board did not err in concluding, on the facts properly found, that respondents engaged in unfair labor practices in instituting the strike and overtime ban against these employers.

The Board agreed with the trial examiner that respondents violated section 8(e) of the Act in signing extension agreements with certain Independents. This transaction has reference to a stipulation of agreement which Schwabacher, Neal, Merrill and Hogan, as well as other Independents, executed on or about November 21, 1959. Thereafter, their operations were continued in exactly the same

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[22] The fact that we have held herein that two of the five disputed clauses are not unlawful does not call for a different result since the unlawfulness of the remaining three clauses provides a sufficient foundation for the Board's findings now under discussion.

The fact that it is the customary practice of the unions to initiate an overtime ban whenever a contract expires and a new one is under negotiation is immaterial in the context of this case. There was evidence credited by the Board indicating that the purpose of this particular overtime ban was to obtain acceptance of the questioned clauses.

manner as they were conducted before the expiration date of the 1957 agreement.

Under this stipulation the parties agreed that there would be no work stoppage at the plants of those signing the instrument ". . . since the undersigned parties have agreed to sign and comply with any and all conditions that will be negotiated by and between Local #17 . . . and the Employing Lithographers Association of San Francisco." In a letter transmitting this form of stipulation to the Independents, the president of Local 17 advised that those signing the agreement "may continue to work under the conditions of the master agreement [of 1957] . . ." It is conceded that the 1957 agreement contained struck work and trade shop clauses (in different form than the clauses proposed during the 1959 negotiations) which were rendered unlawful under section 8(e) enacted in 1959.

In the proceedings before the trial examiner the president of Local 17 testified that the reason the stipulation was sent to the Independents was that the union wanted to be sure that those companies would be under contract, "namely, the economic part of the contract, and a guarantee of retroactive pay, and then they could continue to work." This testimony was excluded on the ground that it did not tend to show the actual intention of the parties.

Respondents argue that the trial examiner erred in excluding this evidence because it tended to explain the "ambiguous" letter of transmittal referred to above. They contend that, with this testimony in the record it would be established that the only part of the 1957 agreement which was extended for the Independents by operation of this stipulation was that having to do with economic conditions. On such a factual premise, respondents assert, the Board erred in concluding that extension of the 1957 agreement as to some Independents violated section 8(e).

The exceptions filed by respondents to the intermediate report of the trial examiner have not been made a part of

the record before us. Accordingly, we do not know whether respondents urged, before the Board, the asserted error of the trial examiner in excluding the testimony of the president of Local 17, referred to above.[23] However, assuming that they did, we do not believe that the trial examiner erred in this regard. The letter of transmittal is not ambiguous in the respect claimed. Moreover, the testimony excluded did not tend to establish the mutual intention of the parties, but only an undisclosed intention of the unions.

Absent that testimony the Board did not err in finding that the stipulation as explained by the letter of transmittal, bound the signing Independents to all provisions of the 1957 contract, including the admittedly unlawful clauses. It was therefore not unreasonable for the Board to conclude that the stipulations effectuated an extension of agreements which, in 1959, became unlawful under section 8(e).

Finally, respondents argue that the exemption of the apparel and clothing industry from the application of section 8(b)(4)(B) and (e), accomplished by a proviso in section 8(e),[5] is arbitrary and capricious and thereby renders section 8(b)(4) and (e) void as discriminatory class legislation contrary to the due process clause of the Fifth Amendment.

For the reasons stated in *Employing Lithographers of Greater Miami, Florida, v. NLRB*, 5 Cir., 301 F. 2d 20, 24-27, and *Brown v. Local No. 17, Amalgamated Lithographers of America*, 180 F. Supp. 294, 305-306, we hold that section 8(b)(4) and (e) of the Act are not void under the Fifth Amendment.

The Board order under review, and the form of notice therein required to be posted, are stated in general terms. They do not make reference to the particular contract clauses which have been under discussion in this opinion. They require only that respondents cease and desist from

[23] In the absence of extraordinary circumstances, a court of appeals may not consider objections which were not raised before the Board. 29 U. S. C. § 160(e); *NLRB v. District 50, United Mine Workers of America*, 355 U. S. 453, 464.

activity designed to force or require the employers to enter into any agreement which is prohibited by section 8(e), or forcing or requiring the employers to cease handling the products of or cease doing business with any other person.

Having held that the trade shop, termination, and refusal to handle clauses are unlawful; that the Board did not err in finding and concluding that the object of the strike and overtime ban was to obtain agreement on these clauses; and that the Board did not err in finding and concluding that respondents violated section 8(e) in signing extension agreements with certain Independents, we affirm the order in its present form and will enter a decree enforcing the same. In complying with that order, however, it is to be understood, consistent with this opinion, that the struck work and chain shop clauses proposed during the negotiations in the fall of 1959, discussed above, are not unlawful, and that union insistence thereon will not violate such Board order as hereby affirmed.

(Endorsed) Opinion Filed Aug. 31, 1962.

Frank H. Schmid, Clerk.

Appendix B

Statute Involved

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlaw-

ful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and Section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Excerpts from Proceedings of Friday, November 9, 1962.

Before:

HAMLEY, HAMLIN and BROWNING, *Circuit Judges*.

ORDER DENYING PETITIONS FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petitions of petitioner National Labor Relations Board, filed September 28, 1962; of intervenors Lithographers & Printers National Association, Inc., filed October 10, 1962; and of respondent Amalgamated Lithographers of America, et al., filed November 5, 1962, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby are denied.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17410

[SAME TITLE]

DECREE APPROVED:

FREDERICK G. HAMLEY,
OLIVER D. HAMLIN,
JAMES R. BROWNING, *U. S. Circuit Judges.*

(Endorsed) Filed Dec. 6, 1962 Frank H. Schmid, Clerk

DECREE

Before:

HAMLEY, HAMLIN and BROWNING, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondents, their officers, representatives and agents, on March 1, 1961. The Court heard argument of respective counsel on May 3, 1962, and has considered the briefs and transcript of record filed in this cause. On August 31, 1962, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that:

A. Respondent Amalgamated Lithographers of America, Local No. 17, San Francisco, California, its officers, representatives and agents, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with The Employing Lithographers, A Division of the Graphic Arts Employers

Association, as the bargaining representative of the employees of its employer-members in the appropriate unit, by insisting upon the incorporation in any collective bargaining agreement of provisions which violate Section 8(e) of the National Labor Relations Act (hereinafter called the Act) and in support of such insistence engaging in strikes or refusals to work overtime.

B. Respondents Amalgamated Lithographers of America, and its Local 17, their officers, representatives and agents, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal to work overtime, or threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce, wherein either case an object thereof is to force or require The Employing Lithographers, A Divison of the Graphic Arts Employers Association, or independent lithographic firms in the San Francisco and Northern California area, to enter into any agreement which is prohibited by Section 8(e), or forcing or requiring the aforesaid persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

(b) Entering into any contract or agreement, express or implied, with Schwabacher-Frey Co., Neal Stratford & Kerr, Merrill Reed Lithographers, Hogan-Kaus Lithograph Co., or other independent lithographic firms in the San Francisco and Northern California area, whereby such employers cease or refrain or agree to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Post in conspicuous places in Respondents' business offices, meeting halls, and places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, National Labor Relations Board (San Francisco, California), shall, after being duly signed by official representatives of Respondents, be posted by Respondents immediately upon receipt thereof and be maintained by them for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the aforesaid Regional Director signed copies of the aforementioned notice for posting by members of the Association and Independents, if such companies agree, in places where notices to employees are customarily posted. Copies of said notices to be furnished by the said Director shall, after being signed by Respondents, as indicated, be forthwith returned to the said Director for disposition by him.

(c) Notify the said Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Decree, of the steps taken to comply herewith.

Endorsed, Decree Filed and Entered

/s/ FRANK H. SCHMID
Frank H. Schmid
Clerk

A TRUE COPY,

ATTEST:

Frank H. Schmid
Clerk

APPENDIX A

NOTICE

TO ALL OUR MEMBERS AND TO ALL EMPLOYEES OF THE EMPLOYING LITHOGRAPHERS, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, AND LITHOGRAPHERS & PRINTING NATIONAL ASSOCIATION, INC., AND THE EMPLOYEES OF THE INDEPENDENT LITHOGRAPHERS OF SAN FRANCISCO AND SAN MATEO COUNTIES, CALIFORNIA, INCLUDING SCHWABACHER-FREY CO., NEAL STRATFORD & KERR, MERRILL REED LITHOGRAPHERS, AND HOGAN-KAUS LITHOGRAPH CO.

PURSUANT TO A DECREE

of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

AMALGAMATED LITHOGRAPHERS OF AMERICA, LOCAL NO. 17,

WILL NOT refuse to bargain collectively with THE EMPLOYING LITHOGRAPHERS, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, as the bargaining representative of the employees of the Association's employer-members in the appropriate unit, by insisting upon the incorporation in any collective bargaining agreement of provisions which violate Section 8(e) of the Act, and in support of such insistence engaging in strikes or refusals to work overtime.

AMALGAMATED LITHOGRAPHERS OF AMERICA, LOCAL NO. 17, AND AMALGAMATED LITHOGRAPHERS OF AMERICA,

WILL NOT engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal to work overtime, or threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require The Employing Lithographers, A Division of The Graphic Arts Employers Association, or independent lithographic firms in the San Francisco and Northern California area, to enter into any agreement which is prohibited by Section 8(e), or forcing or requiring the aforesaid persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

WILL NOT enter into any contract or agreement, express or implied, with Schwabacher-Frey Co., Neal Stratford & Kerr, Merrill Reed Lithographers, Hogan-Kaus Lithograph Co., or other independent lithographic firm in the San Francisco and Northern California area, whereby such employers cease or refrain or agree to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

AMALGAMATED LITHOGRAPHERS OF AMERICA
(Labor Organization)

LOCAL NO. 17, AMALGAMATED LITHOGRAPHERS OF AMERICA
(Labor Organization)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 794

AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) AND LOCAL NO. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.), PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, AND LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 23–45) is reported at 309 F. 2d 31. The Board's decision and order (R. 53–73)[1] are reported at 130 NLRB 985.

JURISDICTION

The decision of the court of appeals was rendered on August 31, 1962 (Pet. 45), and timely petitions for rehearing were denied on November 9, 1962 (Pet. 48).

[1] "R." references are to the Transcript of Record in the court below.

The decree of the court of appeals was entered on December 6, 1962 (Pet. 49). The petition for a writ of certiorari was filed on February 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(e) of the National Labor Relations Act, which makes it an unfair labor practice for an employer and a labor organization to enter into a "hot cargo" agreement under which the employer agrees to refrain from handling products of, or doing business with another employer, is unconstitutional because it exempts from its terms the apparel and clothing industry, but not the lithographic industry.

2. Whether Section 8(e) covers three particular clauses which the petitioner unions demanded in their contract negotiations with respondent employers.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 46–47 of the petition.

STATEMENT

A. The Board's findings of fact

Petitioner Local 17 is the bargaining representative of lithographic employees who work for the 15 employer-members of the respondent Association, as well as for more than a hundred other lithographic employers in the San Francisco and Northern California area (the "Independents") (R. 8–9; 131–133, 135, 368–369). Under customary procedure, Local 17,

with the approval of the International Union, first negotiates a master agreement with the Association and then negotiates separate contracts with each of the Independents containing the provisions of the master agreement (R. 11; 417, 435–439). About August 17, 1959, Local 17 advised the Association and each Independent of its desire to terminate the existing agreement on October 18, 1959 (R. 14; 142–145).[2] Negotiations between Local 17 and the Association began on September 9, 1959, and about 16 bargaining meetings took place between that date and November 20, 1959 (R. 14; 146, 89, 105–106).

Commencing about October 12, 1959, Local 17, with the authorization and approval of the International, demanded that the Association agree to five clauses, which had been drafted to replace provisions of the expiring agreement which were illegal under the recently enacted Landrum-Griffin Act (n. 2, *supra;* R. 14; 195–202, 212, 205, 165, 148, 180–185, 221, 89, 105–106, 152, 163, 174, 269–270, 290–298). The clauses were entitled "Trade Shop Work," "Struck Work," "Chain Shop," "Termination," and "Refusal to Handle" (R. 15–17; 188–202).[3]

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[2] The existing agreement became effective on October 22, 1957, and was subject to termination on October 18, 1959, upon 60 days' notice (R. 14; 137–141, 88, 105, 369, 435–439). It contained "Struck Work" and "Trade Shop" clauses which would clearly have violated the terms of the proposed Section 8(e), which took effect on November 13, 1959 (R. 20–21, 14; 140).

[3] The "Struck Work" and "Chain Shop" clauses are not involved in the proceeding before this Court. Although the Board found that they were violative of Section 8(e), the court of appeals set aside that finding, and the Board has not sought certiorari with respect to that ruling.

The "Trade Shop Work" clause provided (R. 15–16):

> SECTION 22. TRADE SHOP WORK: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such re-opening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.
>
> (b) Union trade shops must affix the Union label on all their products before sending them to any other shop.
>
> (c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.
>
> (d) Upon request by the shop delegate an employer shall advise him of the source of any

lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant.

The "Termination" clause provided (R. 16–17):

> SECTION 24. TERMINATION: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above,[4] or requests any employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer.

The "Refusal to Handle" clause provided (R. 17):

> SECTION 25. REFUSAL TO HANDLE: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24.

The Association refused to agree to these provisions (R. 17; 212–213, 195–196, 221, 247–256, 264–268). On

[4] Section 23 contained the "Struck Work" and "Chain Shop" clauses (R. 16). These clauses are discussed *infra*, p. 13.

and after October 21, 1959, Local 17 refused to permit its members to perform any overtime work until the Association agreed to the proposals (R. 25; 239–240, 246, 417). On November 20, 1959, the bargaining negotiations reached an impasse with the President of Local 17 threatening that the disputed clauses "had to be put in the contract or there would be no contract" (R. 17–18; 271–272). On November 23, 1959, Local 17, with the approval and support of the International, called a strike of its members and picketing commenced at the plants of the Association members (R. 18; 275, 93–94, 106–107, 230–232, 266–267, 269–270, 284–289).[5]

B. The Board's conclusions and order

The Board concluded (R. 55–62) that the five clauses demanded by petitioners in the 1959 negotiations amounted to an "implied" agreement to boycott nonunion and unfair materials and employers, and hence violated Section 8(e) of the Act. The Board further concluded (R. 65, 41) that petitioners, by striking and instituting an overtime ban to secure clauses banned by Section 8(e) and to cause a cessation of business between the Association members and non-Union employers, violated Sections 8(b)(4)(i) and 8(b)(4)(ii) (A) and (B). Finally, the Board

[5] On January 13, 1960, the district court, in proceedings under Section 10(l) of the Act, found reasonable cause to believe that the clauses sought were violative of Section 8(e) and that the strike was thus illegal. *Brown* v. *Local No. 17, Amalgamated Lithographers*, 180 F. Supp. 294 (N.D. Cal.). The strike thereupon terminated and the parties agreed to a new contract (R. 20; 573).

concluded (R. 66–67, 42–43) that petitioners' strike action and overtime ban to force inclusion of the illegal provisions in the new contract constituted a refusal to bargain, in violation of Section 8(b)(3).*

The Board's order (R. 67–70) required petitioners to cease and desist from the unfair labor practices found, and to post appropriate notices.

C. The decision of the court of appeals

The court of appeals agreed with the Board that the "Trade Shop Work," the "Termination," and the "Refusal to Handle" clauses were violative of Section 8(e) of the Act (Pet. 27–29, 38–39). It held, however, that the "Struck Work" and "Chain Shop" clauses were not unlawful (Pet. 29–37). The court enforced the Board's order insofar as it related to the three illegal clauses, and set it aside insofar as it related to the other two clauses (Pet. 39–45). The court rejected petitioners' contention that the exemption of the apparel and clothing industry from Section 8(e) was arbitrary and rendered the entire provision unconstitutional (Pet. 44).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

1. Section 8(e), although generally banning agreements whereby an employer consents to cease doing business with another person whom the union dis-

* The Board found an additional violation of Section 8(e) (R. 63–64), which is not relevant here.

favors (so-called "hot cargo" agreements), contains a proviso which exempts "persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry" (Pet. 47). Petitioners contend (Pet. 7–15) that it was arbitrary for Congress to exempt the apparel and clothing industry but not other integrated industries like the lithographic industry, and that, because of this allegedly arbitrary classification, Section 8(e) offends the due process clause of the Fifth Amendment to the Constitution. The court below properly found this contention to be without merit. Its conclusion accords with that of the other courts which have considered the question. See *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 24–27 (C.A. 5); *Brown* v. *Local No. 17, Amalgamated Lithographers of America*, 180 F. Supp. 294, 305–306 (N.D. Cal.).

It is well settled that, in exercising the commerce power, "Congress may choose the commodities and places to which its regulation shall apply * * * [it] may consider and weigh relative situations and needs." *Currin* v. *Wallace*, 306 U.S. 1, 14. See also, *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426. See also, *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584.

The legislative history of Section 8(e) shows that there were rational reasons for the exemption of the apparel and clothing industry. The bill as it passed the Senate only banned "hot cargo" agreements between a union and an "employer who is a common carrier subject to Part II of the Interstate Commerce Act."[7] The provision was so limited on the ground that hot cargo agreements were most frequently utilized by the Teamsters in the trucking industry, and that common carriers by truck, operating under a franchise from the Government, were under a special obligation to serve without discrimination.[8] However, in the House it was pointed out that hot cargo agreements were prevalent, and no more justifiable, in other industries, including the printing industry.[9] Accordingly, the Landrum-Griffin bill, which passed the House, contained a blanket ban on such agreements.[10]

In the Conference Committee, the fear was expressed that, without some qualifying language, the ban would be interpreted as applicable to the apparel and clothing industry, which everyone agreed (even the sponsors of the Landrum-Griffin bill) should not be subjected to such prohibition.[11] That industry operates through a system whereby a jobber buys the

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[7] See 707(a) of S. 1555 as passed by Senate, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959), 582.

[8] 105 Cong. Rec. 6556–6557; II Leg. Hist. 1161–1163.

[9] See 105 Cong. Rec. 15532 (Cong. Griffin), 15545 (Cong. Rhodes), 15674 (Cong. Bosch); II Leg. Hist. 1568, 1581, 1616.

[10] See 705(b) of H.R. 8400, I Leg. Hist. 683.

[11] See 105 Cong. Rec. 16590–16591 (Analysis prepared by Senator Kennedy and Cong. Thompson), 15848–15849 (Congs. Landrum and Griffin); II Leg. Hist. 1708, 1680–1681.

piece goods and plans the designs and contracts out the cutting and sewing to contractors, whose machines are usually located in a loft and can readily be moved from one location to another. In the past, the industry had been plagued by the sweatshop, for the contractor who signed a contract with the union could easily evade it by contracting out the cutting and sewing to a low wage shop hidden away from the union. Experience had shown that this practice could be checked only by the union inducing jobbers to agree not to do business with contractors who had not signed contracts with the union.[12] To make it clear that the ban on hot cargo agreements was not intended to interfere with these arrangements, the Conference Committee added a specific proviso exempting the apparel and clothing industry from the proscriptions of Section 8(e) (and the companion Section 8(b)(4)).[13]

Petitioners' contention that the apparel and clothing industry exemption is arbitrary misconceives the basis for Congress' action. Petitioners assume that

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[12] *Ibid.*

[13] See 105 Cong. Rec. 17899 (Senator Kennedy), 18134 (Cong. Thompson); II Leg. Hist. 1432, 1721. See also, H. Rep. No. 1147, 86th Cong., 1st Sess. 40, I Leg. Hist. 944.

Another proviso was added exempting certain subcontracting agreements in the construction industry (Pet. 47). This made explicit for that industry what was otherwise implicit in Section 8(e) as a whole. That is, it was not intended that Section 8(e) would apply to typical limitations on subcontracting, which were designed to protect the work of the bargaining unit represented by the contracting union. See 105 Cong. Rec. 17900 (Senator Kennedy), 16590 (Analysis prepared by Senator Kennedy and Cong. Thompson), 18128 (Cong. Barden); II Leg. Hist. 1433, 1708, 1715. See also, H. Rep. No. 1147, 86th Cong., 1st Sess., 39–40, I Leg. Hist. 943–944.

the industry was exempted solely because the jobber and the contractor were in reality an integrated operation, and they argue that there is no justification for failing to accord the same treatment to other integrated operations like the lithographic industry (Pet. 11–13, 14–15). However, as the Fifth Circuit, whose views were adopted by the court below (Pet. 44), pointed out, "the legislative history makes it abundantly clear that reference to the integrated work processes in the garment industry was a limited and somewhat inadequate way of expressing the broader intent and design of Congress to protect an industry peculiarly subject to poor working conditions." *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 26. Even if it be assumed that the degree of integration in the lithographic industry is as close as that between jobber and contractor in the garment industry (which is doubtful), petitioners do not suggest (nor could they) that the lithographic industry was a victim of, or susceptible to, the sweatshop evils which had existed in the garment industry. Congress thus was amply justified in treating the apparel and clothing industry different from the lithographic industry.[14]

2. Petitioners' remaining contentions stand on no firmer footing.

[14] The statements cited by petitioners (Pet. 10, 11, 13, 15), which suggest that the garment industry exemption lacks rational basis, either overlook the considerations set forth above or were made by legislators who opposed extending the hot cargo ban beyond the trucking industry. Cf. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394–395.

(a) The "Trade Shop Work" clause proposed by petitioners provided that, if the employer required an employee to handle lithographic work made in a shop disfavored by the Union, the Union could "re-open the contract as to that employer for negotiations as to the whole or any part thereof," and, if new terms could not be agreed upon within 10 days, the Union could "terminate the contract forthwith." The Board found, and the court below agreed, that an employer who is faced with the possibility of having the contract completely reopened if he handles disfavored work would not voluntarily subject himself to that consequence; and hence that the clause—notwithstanding the disclaimer to the contrary—amounts to an implied commitment not to handle such work (R. 59–60; Pet. 28). Petitioners contend (Pet. 16–17), however, that the purpose of the reopener clause was not to deter the employer from doing business with a non-union firm if he desired, but merely to enable the Union to negotiate more "equitable" contract terms in the light of the employer's changed method of doing business, and that the Board erred in rejecting their offer to prove that such a change would justify the Union in increasing its economic demands. The offer was properly rejected, for, as the court below observed (Pet. 28–29), it would merely tend "to show that it was economically advantageous for the union to have employers refrain from dealing with non-union employers." Under settled principles, economic necessity does not excuse conduct which would otherwise be violative of

the Act;[15] irrespective of the Union's "good" motive, the practical effect of the clause was an agreement of the type which Congress banned in Section 8(e).

(b) The "Termination" clause provided that the Union could terminate the contract "forthwith" if the employer requested an employee to handle any work covered by the "Struck Work" and "Chain Shop" clauses (Section 23),[16] or "any work received from or destined for any employer involved in such strike or lockout." The court below, although finding that the "Struck Work" and "Chain Shop" clauses were not violative of Section 8(e) (n. 16, *supra*), nevertheless held that the "Termination" clause was unlawful. The court stated (Pet. 38): "In validat-

[15] See *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C.A. 9); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C.A. 6).

[16] The "Struck Work" clause provided that the contracting employer would not render assistance to any lithographic employer who was on strike or had locked out his employees and that, in implementation of this purpose, the employees covered by the contract would not be requested to handle any lithographic work "customarily produced" by such employer. The "Chain Shop" clause excused employees covered by the contract from working if their employer or his subsidiary had a strike in another plant. The court below held that both of these clauses were "primary" and thus outside the reach of Section 8(e). The court construed the "Struck Work" clause as embodying merely the so-called "ally" doctrine, which holds that an independent employer loses his neutral position and becomes an ally of the primary employer if he performs work which the primary employer would have done but for the strike (Pet. 29–32). Moreover, the "Chain Shop" clause was held not to violate Section 8(e) because it "is not an undertaking by a primary employer not to handle the work of *another* employer. It constitutes only an agreement by a primary employer not to request his employees to handle *his own* work in any of *his* plants * * *" (Pet. 36).

ing the struck work clause * * * we have construed it as applying only with regard to struck work which is not customarily handled by the primary employer. But this termination clause is not so limited. It applies with regard to 'any' work received from or destined for any employer involved in a strike or lockout of the kind referred to in section 23 * * *, whether such work was 'customary' or 'farmed out' work." Petitioners do not challenge the propriety of this construction, but contend (Pet. 17) that the clause is not unlawful because there is nothing in Section 8(e) "which compels them to continue a contractual bargaining relationship under circumstances which are offensive to a trade union philosophy." This argument overlooks that here, as with the renegotiation and termination provisions of the "Trade Shop Work" clause, the practical effect of the clause was not termination of the agreement but securing an implied commitment from the employer not to do business with a disfavored employer, the evil at which Section 8(e) is directed (see R. 62; Pet. 28–38).

(c) The "Refusal to Handle" clause provided that the employer would not discipline an employee for refusing to handle struck or non-union-goods. Petitioners contend (Pet. 18) that this clause is not unlawful because it merely "preserves to the individual employees the option to handle or refuse to handle certain work." There is no merit to this contention. While an employee has the right to refuse to work for an employer, the employer has the correlative right to require that the employee perform his duties or leave the job. The "Refusal to Handle"

clause requires the employer to bargain away his right to discipline or discharge an employee who refuses to handle non-union products. In these circumstances, the clause amounts to an implied agreement not to handle such products, no less than the other clauses found to be unlawful. For, without employees to perform the task, the employer would have no real alternative to declining to undertake it. See *Employing Lithographers of Greater Miami, Florida* v. *National Labor Relations Board*, 301 F. 2d 20, 30 (C.A. 5); *Los Angeles Mailers Union No. 9* v. *National Labor Relations Board*, 311 F. 2d 121, 124–125 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COMÈ,
Assistant General Counsel,
National Labor Relations Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) AND LOCAL NO. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.), *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, AND LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, INC. AND EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, INC. AND EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, IN OPPOSITION

HELEN F. HUMPHREY
Counsel for Respondents
1509 - 22nd Street, N. W.
Washington 7, D. C.

HUMPHREY AND YOUNG
Attorneys for Lithographers and Printers National Association, Inc. and Employing Lithographers Association, a Division of the Graphic Arts Association
1509 22nd Street, N. W.
Washington 7, D. C.

QUENTIN O. YOUNG
Of Counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 23-45) is reported at 309 F. 2d 31. The Board's decision and order (R. 53-73)[1] are reported at 130 NLRB 985.

[1] "R." references are to the Transcript of Record in the court below.

JURISDICTION

Jurisdictional requirements are adequately set forth in the petition and in the brief of the National Labor Relations Board in opposition to the petition.

QUESTIONS PRESENTED

1. Is Section 8(e) of the National Labor Relations Act, as amended, unconstitutional insofar as it grants an exemption to the employers in the clothing and apparel industry from its blanket proscription to all other employers, within the purview of the Act, from entering into contracts with labor organizations which contain so-called "hot cargo" clauses whereby the employer agrees to refrain from handling the products of, or doing business with, another employer or person?

2. Whether a strike by the petitioning unions against the Employing Lithographers Association, a Division of the Graphic Arts Employers Association, of San Francisco, California, the purpose of which was to force the employer-members of the Association to agree to certain contract language, is in violation of the proscription of Section 8(e) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra*, p. 13.

STATEMENT

The charging party, the Employing Lithographers Association, a Division of the Graphic Arts Employers Association, of San Francisco, California (hereinafter

called the "Association"), is an association of lithographic employers located in and around San Francisco, California. Its primary purpose is the negotiation and administration of labor contracts, on behalf of its members, with Local 17 of the Amalgamated Lithographers of America. The Association's members employ approximately one-half of the lithographic craftsmen in the San Francisco area. There are one hundred other lithographic employers in this area who are not members of the Association (hereinafter called the "Independents") who employ the remaining lithographic craftsmen in this area.

The Lithographers and Printers National Association, Inc. (hereinafter called "LPNA") is a national trade association made up of members throughout the United States who employ lithographic craftsmen. Foremost amongst its purposes is the stabilization of labor-management relations in the industry. Because of the far-reaching effects of the questions presented by the Union's adamant demand for the inclusion of certain contract language in the contract being negotiated between the Association and Local 17, LPNA filed independent charges against the Union before the National Labor Relations Board and intervened in the enforcement proceeding before the Court of Appeals for the Ninth Circuit.

Under custom of long standing, the Association negotiated labor contracts with Local 17, and the Independents would then adopt this contract. All of the contract clauses presented to the Association by Local 17 were originated by the International Union, and Local 17 did not have the authority to agree to any changes in these clauses without the specific consent of the International (R. 11; 417, 435-439).

Prior to the termination of the then current labor contract, Local 17, on August 17, 1959, notified the Association that they desired to renegotiate the labor agreement which by its terms terminated on October 18, 1959. Thereafter, the parties negotiated jointly, having some sixteen meetings between September 9, 1959 and November 20, 1959 (R. 14; 146, 89, 105-106).

During the course of these negotiations, Local 17, by authorization and direction of the International Union, insisted that the Association include in the new contract five clauses which may be described as "control" clauses. Clauses similar to these had been included in the expiring contract, but the old clauses were clearly illegal under the then recent amendments to the National Labor Relations Act, *supra* (R. 14; 195-202, 212, 205, 165, 148, 180-185, 221, 89, 105-106, 152, 163, 174, 269-270, 290-298).

In order to assert maximum pressure upon the employers, Local 17 ordered all its members to refuse to work overtime (R. 25; 239-240, 246, 417). This ban was enforced from October 21, 1959 until Local 17, with approval of the International, called a full strike against members of the Association on November 23, 1959 (R. 18; 275, 93-94, 106-107, 230-232, 266-267, 269-270, 284-289). During this period Local 17, through its President, insisted that the disputed clauses "had to be put in the contract or there would be no contract" (R. 17-18; 271-272). The strike continued until January 13, 1960 when the district court, in a Section 10(1) proceeding under the Act, declared the purposes of the strike were in violation of Section 8(e) and therefore illegal.

The clauses which Local 17 demanded be included in the contract, and which the Union claimed were not subject to negotiation at the bargaining table, were:

TRADE SHOP WORK: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such re-opening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.

(b) Union trade shops must affix the Union label on all their products before sending them to any other shop.

(c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.

(d) Upon request by the shop delegate an employer shall advise him of the source of any lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant.

STRUCK WORK: The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck by any Local of the Amalgamated Lithographers of America or the International or where members of any such Local or the International are locked out, and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work (other than work actually in process in the plant) customarily produced by such employer.

TERMINATION: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above, or requests any employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer.

REFUSAL TO HANDLE: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24.

CHAIN SHOP: The Employers agree that the employees covered by this contract shall not be requested to handle any work in any plant if in another plant of any employer or any subsidiary of such employer in any part of the United States,

or Canada or any Local of the Almalgamated Lithographers of America or the International is on strike or members of such Local or International are locked out.

THE DECISIONS BELOW

Following the strike on November 23, 1959, the General Counsel sought and obtained an injunction on the basis that the strike was illegal. *Brown* v. *Local 17, Amalgamated Lithographers of America, et al.*, 180 F. Supp. 294. The Board, after a full hearing, found that all of the clauses which the Union sought to include in the contract were illegal. 130 NLRB 985. The Court of Appeals for the Ninth Circuit then found three of the clauses, *supra*, pp. 5, 6, to be illegal and, by reconstructing the language in the "Struck Work" and "Chain Shop" clauses, held these clauses could be construed as valid (Board's brief, p. 3, n. 3). The Board then sought a rehearing on the circuit court's decision which was denied on November 9, 1962 (Pet. App. C, 48). Despite a conflict between the decision of the circuit court for the Ninth Circuit and the circuit court for the Fifth Circuit (*Employing Lithographers of Greater Miami, Florida* v. *N.L.R.B.* and *N.L.R.B.* v. *Amalgamated Lithographers of America, et al.*, 301 F. 2d 20 (1962)), the Board has not sought a cross-petition for certiorari in regard to the "Struck Work" and "Chain Shop" clauses.

ARGUMENT

I. The Provisos Exempting Other Industries Do Not Make Section 8(e) Unconstitutional

The legislative history of the 1959 amendments shows the grounds on which Congress, with knowledge of similar practices in the printing industry, chose to exempt only the construction and apparel and clothing industries from the ban on "hot cargo" clauses imposed by Section 8(e).[2]

Congress made it clear why it felt that these industries alone should be permitted the practices and contract provisions barred to others, including the printing industry. In any case, the basic regulatory enactment should not fall, even if the exemptions were, contrary to the fact, arbitrary. Here, we submit the differences between the exempt and other industries justify the exemption. *Brown* v. *Local 17, supra*, analyzes the authorities in point and, we urge, reaches the proper conclusion, 180 F. Supp. 305.

The analysis of Judge Sweigert's decision in *Brown* v. *Local 17, Amalgamated Lithographers of America, et al., supra*, completely answers the allegations of the unconstitutionality of these exemptions:

> "With this view of the matter we review the well-established rules by which the constitutionality of Congressional enactments under the Commerce Clause, Article 1, Section 8, Clause 3, involving discriminations, classifications and exemptions, should be determined by the courts.
>
> "The courts have stressed that the Fifth Amendment, unlike the Fourteenth Amendment, contain

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[2] H. Rep't 1147, 86th Cong. 1st Sess., pp. 943-944; Legislative History (1959) 943-944.

no equal protection clause. See: *Currin* v. *Wallace*, 306 U.S. 1, 13-14 (1938).

"Assuming, that there might be a discrimination of such injurious character as to bring into operation the due process clause of the Fifth Amendment, *Bolling* v. *Sharpe*, *supra*, mere lack of uniformity in the Congressional exercise of the commerce power does not constitute a denial of due process, *Currin* v. *Wallace*, *supra*.

"Almost without exception the courts have refrained from applying the uniformity principle as a restriction upon the Congressional exercise of the commerce power. They have recognized that economic problems are practical problems, and that their solution often requires considerable latitude and flexibility. Accordingly, they have upheld numerous statutory schemes of far-reaching economic importance, involving incidental discrimination. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Detroit* v. *United States*, 317 U.S. 329 (1943); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381 (1939); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909).

"The Labor-Management Relations Act of 1947 has, itself, withstood constitutional attack, although it provides exemptions for agricultural workers, domestic help, railway employees, employees of non-profit hospitals, employees of governmental instrumentalities, and supervisory employees. See: *NLRB* v. *Budd Manufacturing Co.*, 169 F. 2d 571 (6th Cir. 1948); *Brown* v. *Roofers Local 40*, 86 F. Suppl. 50 (N.D. Cal. 1949).

"In dealing with Congressional enactments under the commerce clause, the Courts are dealing with a plenary power of the Congress, complete in itself, and, they must, and traditionally do, extend wide latitude. It is not for the Courts to super-

wise policy or the extent to which that policy should go. In this field the Congress need not deal at one time with all the evils it may observe. It may proceed by cautious advance, step by step. It may choose the commodities, industries and places with which it will deal, *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 46 (1937); *Currin* v. *Wallace*, *supra*; *Sunshine Coal Co.* v. *Adkins*, *supra*; *Hirabayashi* v *United States*, *supra*.

"In the present situation, we are not inclined to assume that the language contained in the House Management Report (but not in the Senate Report or in the Act itself) represents the final view of the Congress.

"Even if it did, there would still be a strong presumption that other reasonable considerations existed to support the exemption of the garment industry as distinguished from the lithographic industry. The garment industry exemption need not have been based solely upon the integrated nature of its work processes. Other economic and social circumstances peculiar to the garment industry may well have prompted the exemption. See e.g., Cong. Rec. Senate, Sept. 3, 1959, p. 1643, BNA, *supra*, at 472.

"Therefore, we conclude that Section 8(e) must be deemed a valid Congressional exercise of the commerce power."

Moreover, the Union's contention that Congress enacted the provisos without a proper understanding of the integration in the lithographic industry must fall. It is clear that Congress not only understood the problems of the integrated nature of the apparel and clothing industry, but also was well aware of the manner in which the entire printing industry conducted its operations (*Employing Lithographers of Greater Mi-*

ami, Florida v. *National Labor Relations Board, supra*).[3]

Thus, although Congress was aware of the existence of "hot cargo" clauses in the printing industry, Congress in its discretion did not choose to extend the exemption granted to the apparel and clothing industry to any other industry. This right of Congress to enact legislation of this nature is substantially supported in Judge Sweigert's opinion in *Brown* v. *Local 17, supra.*

II. The Strike to Obtain Inclusion of So-Called "Control" Clauses Was in Violation of the Act

The contract clauses set forth *supra*, pp. 5, 6, 7, clearly, *in toto*, as well as individually, contemplate that the members of the Association will cease doing business with any other empoyer who has no contract or has a contract dispute with the Union, or any of its locals throughout the entire United States. Insofar as the strike and economic pressures sought to compel not only the illegal provisions, but the practices of ceasing doing business with other employers for which those clauses provided, the conduct of Local 17 and the International Union violated Section 8(e) of the National Labor Relations Act. *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675:

[3] During the debate on the committee bill (H.R. 8342) and the Landrum bill (H.R. 8400), Congressman Rhodes of Arizona referred to the fact that a ban on "hot cargo" clauses "would accomplish a much needed reform," since "not only do most Teamster contracts contain such clauses but various building and printing trade unions have insisted on contracts under which employees are excused from handling certain prefabricated products, products which do not bear the label of a particular union, or products manufactured by a company dealing with some other union." *Legislative History of the Labor Management and Disclosure Act of 1959*, U. S. Gov. Print. Off. (1959), p. 1581.

N.L.R.B. v. *Local 294, International Brotherhood of Teamsters (Van Transport Lines, Inc.)*, 298 F. 2d 105. The Court need only look at the face of the Act to see that these provisions set up an agreement whereby the employer ceases or refrains, or agrees to do so, from handling, using or otherwise dealing in the products of other employers, as prohibited by Section 8(e).

In determining the Congressional intent, "the very language in which Congress has expressed its policy" is "most relevant, of course." (*Local 1976, Carpenters, etc.* v. *N.L.R.B.*, 357 U.S. 93 at 100), *Unexcelled Chemical Co.* v. *U. S.*, 345 U.S. 59, 64. This is one situation in which we have such a clear expression.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

HELEN F. HUMPHREY
Counsel for Respondents
1509 - 22nd Street, N.W.
Washington 7, D. C.

HUMPHREY AND YOUNG
Attorneys for Lithographers and Printers National Association, Inc. and Employing Lithographers Association, A Division of the Graphic Arts Association
1509 - 22nd Street, N.W.
Washington 7, D. C.

QUENTIN O. YOUNG
Of Counsel

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APPENDIX A

Statute

Section 8(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.